IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 04..9..2007

Coram:

The Hon'ble Mr. Justice K.CHANDRU

W.P. No.36779 of 2006

A.Anandan .. Petitioner

vs.

1. The Chairman
Food Corporation of India
16-20 Barakhamba Lane
New Delhi

2. The Zonal Manager (South)
Food Corporation of India
Zonal Office, 2 Haddows Road
Chennai - 6

3. The Senior Reginal Manager &
Competent Authority
Food Corporation of India
Regional Office
P.Kalinga Rao Road, Subbaiah Circle
Bangalore

4. The National Council for SC/ST
Lok Nayak Bhavan, New Delhi

5. Executive Director (South)
(Formerly Zonal Manager(South) &
Appellate Authority
Food Corporation of India
No.3 Haddows Road
Nungambakkam
Chennai - 6 .. Respondents

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Petition filed under Article 226 of the Constitution of India seeking for issuance of writ of Certiorarified Mandamus calling for the records of the fifth respondent Executive Director (South) & Appellate Authority, Food Corporation of India, Zonal Office, Haddows Road , Nungambakkam, Chennai-6 in communication No.32(1)/ 2005 CR Cell dated 06.7.2006, quash the same and direct the respondents to reinstate the petitioner in service with continuity of service, backwages and all attendant benefits.

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For Petitioner : Mr.K.Subramanian, SC
For Mr.S.Punniyakotti
For Respondent 1 to 3 and 5 : Mr.P.D.Audikesavalu

O R D E R

I have heard Mr.K.Subramanian, learned Senior Counsel appearing for Mr.S.Punniyakotti, counsel for the petitioner and Mr.P.D.Audikesavalu, learned counsel appearing for the respondents and have perused the records.

2. The petitioner challenges the order dated 06.7.2006 wherein and by which the fifth respondent appellate authority converted the punishment of removal from service imposed on him to that of compulsory retirement from the service with effect from 11.8.1999. The petitioner was employed as Assistant Grade I in Zonal Office of the Food Corporation of India [for short, 'FCI']. Due to agitation conducted by the SC / ST Employees Association demanding for implementation of the post based roster system, certain unpleasant events took place in the office of the respondent Corporation. By an order dated 30.7.1999, the petitioner was transferred to the Karnataka Region. There was en masse transfer of 46 employees from Chennai Region to other places and the petitioner was the Chairman of the FCI SC / ST Employees' Welfare Association, South Zone, Chennai. From November 1999 to May 2000, the transferred employees started a series of demonstration in front of the Zonal Office of the FCI. On 15.5.2000, the second respondent filed a Civil Suit before the Original side of this Court being C.S. No.368 of 2000 against 21 employees out of 46 employees, who were transferred, seeking for an injunction restraining the transferred employees from holding any demonstration and also for recovery of a sum of Rs.10,01,000/- by way of damages from those workmen for loss of reputation. The petitioner was not personally issued with the transfer order. However, a public notice dated 01.11.2000 was published in 'The Hindu' newspaper and it was intimated in that notice that the petitioner was transferred by order dated 30.7.1999 and that he was relieved on 10.8.1999. He did not join even after lapse of 2-1/2 years in the place of posting and when registered letter dated 17.10.2000 was sent to him, he neglected to report at the new place of posting and that he was also issued with a show cause notice as to why his services should not be terminated in terms of Regulation 19 of the FCI Staff Regulations 1971 [for short, 'Regulations'] . Again, by a public notice published in :'The Hindu' dated 03.12.2000, a show cause notice was issued to the petitioner. Once again, by a public notice dated 21.12.2000, the impugned order of termination was passed against the petitioner, which was also published in 'The Hindu' dated 18.01.2001. Thus, the impugned order came to be passed based upon the Regulation 63(ii) read with Regulation 56 of the Regulations.

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3. Regulation 63(ii) of the Regulations reads as follows:
"Notwithstanding any contained in Regulation 58 to Regulation 62:
(i) ... Omitted ...
(ii) Where the disciplinary authority is satisfied for the reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these regulations."

4. Regulation 56 of the Regulations reads as follows:
"56. Disciplinary authorities:
The Board or the authority specified in Appendix 2 in this behalf or any other authority (higher than the authority specified in Appendix (2) empowered in this behalf by a general or special order of the Board, may impose any of the penalties specified in Regulation 54 on any employee."

5. It is needless to state that Regulation 63(ii) is akin to the provision enshrined to Article 311(2)(b) of the Constituion of India. In fact, the said provision, viz., Article 311(2)(b) came to the considered by the Supreme court in 1985 (3) SCC 398 [Union of India v. Tulsi Ram Patel]. The relevant passage found in paragraph 130 reads as follows:

Pare 130: "The condition precedent for the application of clause is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable

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in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day

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the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter."

Para 131: "It was submitted that where a delinquent government servant so terrorizes the disciplinary authority that neither that officer nor any other officer stationed at that place is willing to hold the inquiry, some senior officer can be sent from outside to hold the inquiry. This submission itself shows that in such a case the holding of an inquiry is not reasonably practicable. It would be illogical to hold that the administrative work carried out by senior officers should be paralysed because a delinquent government servant either by himself or along with or through others makes the holding of an inquiry not reasonably practicable."

6. Per contra, Mr.P.D.Audikesavalu relied upon the judgment of the Supreme Court reported in 2005 (7) SCC 764 [Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and others] wherein the Tulsi Ram Patel's case (cited supra) was considered and explained. He relied upon the following passages found in paragraph 50 and 51 of the judgment, which read as follows:

Para 50: ".... The power was exercised by the disciplinary authority under the second proviso to Article 311 (2). Reiterating the principles laid down in Tulsi Ram Patel and upholding the action, the Court observed that there are circumstances in which such a drastic action is called for. The Court noted that it was not possible to enumerate the cases in which it would not be reasonably practicable to hold

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inquiry under Article 311(2), but certain illustrative cases have been highlighted which included activities of terrorising, threatening or intimidating witnesses who might be giving evidence against a civil servant or threatening, intimidating or terrorising disciplinary authority or his family members or creating an atmosphere of violence or general indiscipline and insubordination. The Court also indicated that though it was a mandate of the Constitution to record reasons in writing for dispensing with an inquiry, it was not necessary that such reasons should find place in the final order or they should be communicated to the delinquent. It was no doubt emphasised that it would be better if such reasons are recorded in the order itself and communicated to the delinquent officer. Regarding suspension of a civil servant, the Court opined that it is not necessary that the civil servant should be placed under suspension until such time the situation is improved and it becomes possible to hold inquiry against him. According to the Court, it would be difficult to foresee how long the situation would last and when normalcy would return or be restored."

Para 51: "The Court then said: [SCC p. 272, para 6(69)]

"In certain cases, the exigencies of a situation would require that prompt action should be taken and suspending a civil servant would not serve the purpose and sometimes not taking prompt action might result in the trouble spreading and the situation worsening and at times becoming uncontrollable. Not taking prompt action may also be construed by the troublemakers as a sign of weakness on the part of the authorities and thus encourage them to step up their activities or agitation. Where such prompt action is taken in order to prevent this happening, there is an element of deterrence in it but this is an unavoidable and necessary concomitance of such an action resulting from a situation which is not of the creation of the authorities."

7. But after referring to those decisions, the conclusion of the Supreme Court in the Ajit Kumar Nag's case (cited supra) is found in paragraph 53 of the judgment, which reads as follows:

Para 53: "We have also gone through the decision of the learned Single Judge as well as of the Division Bench. It is clear from the record of the case that the writ petition was filed by the appellant immediately after the order of dismissal was passed

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against him and the learned Single Judge considered the legality of the order. The learned Single Judge perused the relevant record produced at the time of hearing and noted that the alleged incident did take place. All persons requested for taking a strong action against the petitioner (the appellant herein) and no lenient view was called for. Even after the sons of Parul Jana came down from the 1st floor and informed the petitioner that their mother's condition was stable, the petitioner continued the agitation. Being an employee of the Corporation, the petitioner had no business to lead an unruly mob resulting in damage to property and assaulting the hospital staff who were on duty and were treating patients including a patient having cardiac treatment."

Para 54: "The learned Single Judge, therefore, concluded:

"If such discipline is not considered to be grave, I do not know what more should be appropriate to justify the order of dismissal."

Para 55: "When an intra-court appeal was filed against that order, the Division Bench again considered the contentions raised by the appellant. Dealing with the argument that the documents were not given, it was submitted on behalf of the Corporation that no such prayer was made. The Court, therefore, observed relying on a decision of this Court in Aligarh Muslim University v. Mansoor Ali Khan that no prejudice had been caused to the appellant. The Court examined the report and perused the record. It was disclosed from the material placed before the Court that there was a situation which created disorder in the establishment for which the police had to be called for and the General Manager (PJ) in charge had to rush late at night. People were frightened and there was ultimatum by staff members due to which there was a possibility of break down of the entire system. The Division Bench, therefore, stated: "These are situations with which the person at the spot has to deal with. The authority on the spot is the best judge of the situation prevailing. It is he who has to assess the situation and take steps." In the light of prevailing circumstances, the Division Bench observed, the action could not be termed as illegal, unlawful or perverse. Regarding plea of mala fide, the Court noted that adequate material had not been placed on record which would go to show that the order was malicious or mala

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fide. The Division Bench, therefore, dismissed the appeal."

Para 56: "In our view, neither the learned Single Judge nor the Division Bench has committed any error of law and/or of jurisdiction which deserves interference in exercise of discretionary jurisdiction under Article 136 of the Constitution. As is clear, the situation has been created by the appellant. It was very grave and serious and called for immediate stern action by the General Manager. Exercise of extraordinary power in exceptional circumstances under Standing Order 20(vi) in the circumstances, cannot be said to be arbitrary, unreasonable or mala fide. It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". (vide E.P. Royappa v. State of T.N.) There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra (SCC p. 802, para 2): "It (mala fide) is the last refuge of a losing litigant."

8. Therefore, one has to look into the circumstances where the discretion found in Regulation 63(ii) is available and where the disciplinary authority was satisfied in invoking Regulation 63 (ii) of the Regulations. In the present case, immediately after the dismissal, the petitioner filed a writ petition before this Court in W.P.No.39971 of 2005 and this Court, by an order dated 15.12.2005, directed the respondent to treat it as Review Petition under Regulation 74 of the Regulations and to dispose of the same on merits. It is pursuant to this order, the impugned order dated 06.7.2006 was passed by the fifth respondent converting the punishment of removal from service to one of compulsory retirement.

9. In the present case, it must be seen that the show cause notice was published in "The Hindu" daily newspaper in the business page on 01.11.2000. It was stated that the petitioner should report to the Bangalore Office within 3 days failing which disciplinary action will be taken against him and since he had not reported, he was asked to show cause as to why his services should not be terminated under Regulation 19 of the Regulations. Regulation 19 deals with termination of services of the employee by giving 90 days notice or pay and allowances in lieu of notice. Thereafter, the final show cause notice was published again in "The Hindu" newspaper dated 03.12.2000 in which it is stated that the

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petitioner had violated Regulation 17 read with 32A(6 and 20) of the Regulations. While Regulation 17 deals with transfer, 32-A describes various misconducts. Regulation 32-A(6) deals with wilful insubordination or disobedience of any lawful order of the superior and 32-A(20) deals with wilful absence from duty after expiry of joining time on transfer. It was stated in that show cause notice that the petitioner was not receiving any lawful orders of the competent authority and that he was not taking cognizance of fresh notice. It was not possible for the competent authority to have any kind of enquiry or proceeding as per the Staff Regulations. Therefore, the special procedure found in Regulation 63 of the Regulations was invoked. Thereafter, final dismissal order was also published in "The Hindu" newspaper dated 18.01.2001 wherein the dismissal order dated 21.12.2000 was published. The following portion found in the dismissal order can be usefully extracted.

> "WHEREAS it is not possible to communicate with him either in person or post and he is continuously denying to receive the lawful orders of the Competent Authority and even not taking cognizance of the Press Notification, thus it is not possible for the Competent Authority to have any kind of enquiry or proceedings as per FCI Staff Regulations, 1971 compelling the Competent Authority to invoke special provisions under Regulation-63 of FCI Staff Regulations, 1971.
>
> AND WHEREAS inspite of having been given repeated opportunity of being heard and fully notified, the said official has deliberately and intentionally failed and / or neglected to show cause for his non-compliance with the Competent Authority's Order No.267/99 E.I. Dated 30.7.1999. In view of the above, the undersigned being the Disciplinary Authority impose the penalty of "REMOVAL FROM SERVICE" of the Food Corporation of India with effect from 11.8.1999 F/N under Regulation 63(ii) read with 56 of the FCI (Staff Regulations, 1971)."

10. Therefore, from the beginning to the end, the respondent FCI has been conducting all the proceedings only through notifications advertised in the newspaper. In view of the above, two questions arise for consideration. (1) Whether the circumstances mentioned in the dismissal order existed on facts; and (2) Whether the reasons recorded in dispensing with the enquiry as per Regulation 63(ii) of the Regulations is available in the present case. In order to answer the first question, it must be seen whether the procedure for serving notice on employees as found in Staff Regulations, has been followed or not.

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11. Regulation 75 of the Regulations deals with service of orders and notices and the same is as follows:

> 75. Miscellaneous:
>
> Service of Orders, Notices, etc.:
>
> The following procedure shall be followed by the Corporation while serving orders, notices, etc. on Corporation's employees:
>
> (i) Every order, notice and other process made or issued under these Regulations shall, as far as possible, be delivered or tendered to the employees concerned in person;
>
> (ii) Where such order, notice or other process cannot be served personally as at (i) above, the notice etc. shall be served on such employee by Registered Post acknowledgment due at the address of the employee available with the Corporation at the office where the employee was last working or, if he is on leave, as per his leave application particulars, if any, and
>
> (iii) If the notice sent by the Registered post is returned unserved, it should be published in the Local / Regional Language Newspapers and All India Newspapers, as appropriate and upon such publication, it shall be deemed to have been personally served on such employee."
>
> (Emphasis added)

12. Regulation 75(iii) clearly states that if any employee for whom notice is sent by registered post returned unserved, it should be published in the local / regional language newspaper and in addition to that, an All India Newspaper as appropriate and upon such publication only, it can be deemed to have been personally served on such employee. Nowhere the respondent FCI had complied with the Regulation 75(iii) of the Regulations. The only option open to the FCI is to publish either in the local or in the regional language newspaper and All India Newspaper and it does not talk about publication in any English newspaper, which is neither the local nor regional language. Therefore, the fault is on the FCI taking advantage of the deemed service provided under Regulation 75(iii) of the Regulations. The basis on which the show cause notice was issued and the removal order do not exist, as admittedly, the publication was done only in English newspaper.

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13. Then the next question arises as to whether the circumstances of the present case warranting the disciplinary authority to be satisfied that it was not reasonably practical to hold an enquiry in the manner provided under the Regulations. In fact, as can be seen from the passage found in the dismissal order extracted above, the only ground on which Regulation 63(ii) was invoked was that it is not possible to communicate the petitioner either in person or by post. That cannot be a ground to dispense with the enquiry because Regulation 75 of the Regulations provides that if an order is not able to be communicated, it provides for a method and mode of service of other means and as found earlier, that method or mode was not followed in the present case. Secondly, it is not the case where it was reasonably practical to hold an enquiry because there was no such activities of terrorising, threatening or intimidating witnesses, who may give evidence against the employees and there was no atmosphere of creating violence as found in Tulsi Ram Patel's case (cited supra). Even the factors found in Ajit Kumar Nag's case as found in paragraph 53 of the said judgment extracted above, the workmen taking an unruly mob resulting in damage to property and assaulting hospital staff does not exist in the present case. Even in Ajit Kumar Nag's case, the Supreme Court has cautiously held that exercise of extraordinary power in exceptional circumstances cannot be said to be arbitrary, unreasonable or mala fide.

14. In the present case, the charge against the petitioner was that he did not report in the transferred place and the defence of the petitioner was that the transfer order was not served on him. This does not involve in any complicated question to be answered by examining several witnesses and a simple enquiry by the FCI would have been sufficient. If for some reason, the petitioner had not participated and avoid receiving of notice, Regulation 75 of the Regulations takes care of the situation and inspite of such deemed service of notice, the petitioner was not willing to appear, then it would have resulted in ex parte enquiry in which evidence could have been recorded and the matter could have been disposed of. On the contrary, the respondent FCI on a thorough misunderstanding of the law on the subject, went on an quixotic way of interpretation in Regulation 63(ii) of the Regulations indulging in several paper publications in English newspaper thereby spending considerable amount of money on newspaper advertisement. The discerning intention seems to be to discredit the petitioner than to comply with the statutory Regulations made in this behalf. In these circumstances, this Court has no hesitation in setting aside the impugned order and allow the writ petition.

15. In the light of the above, the writ petition shall stand

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allowed and the impugned order stands set aside. The petitioner is eligible for reinstatement in service with all consequential benefits. However, this will not prevent the respondents taking any further action in terms of the statutory Regulations framed by the FCI, if the circumstances of the case so warrant. However, there will be no order as to costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Chairman
   Food Corporation of India
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   (Formerly Zonal Manager(South) &
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   Food Corporation of India
   No.3 Haddows Road, Nungambakkam
   Chennai - 6

1 cc to Mr.S. Punniyakotti, Advocate, /SR. 55629
1 cc to Mr.P.D. Audikesavalu, Advocate, SR. 55036

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